DATE: January 19, 1996
CASE NO. 92-ERA-10

IN THE MATTER OF

REGINO R. DIAZ-ROBAINAS,

COMPLAINANT,

v.

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

Complainant, Regino R. Diaz-Robainas (Robainas), filed this complaint alleging that Respondent, Florida Power & Light Company (Florida Power), retaliated against him in violation of the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA or Act), 42 U.S.C. § 5851 (1988).[1] The Administrative Law Judge (ALJ) ruled that the complaint should be dismissed because Robainas failed to meet his burden of proof. *See* Recommended Decision and Order (R. D. and O.) dated October 29, 1993. Upon review, I disagree and remand for the ALJ to determine the remedy. *See* 29 C.F.R. § 24.6(b) (1995).[2]

BACKGROUND

Robainas was employed by Florida Power as an engineer from 1980 until August 19, 1991, when he was fired. Transcript (T.) at 756; Respondent's Exhibit (RX) 50.[3] Throughout his employment, Robainas generally received high performance ratings for his technical job knowledge but lower ratings for his "judgment." *See* RX 1. He was idealistic but not practical at times. T. at 404. However, he was promoted several times,

including in 1985 to the position of Lead Engineer in Instrument & Control (I&C), a department that determines how equipment is to behave under different accident scenarios, and later to the position of Senior Engineer, which he held at the time he was

fired. T. at 45, 51.

In 1988 Florida Power hired John Hosmer as the Director of Nuclear Engineering. T. at 652. Hosmer first met Robainas in March 1990, when Robainas complained about the new mandatory drug testing policy. T. at 57, 768-70. Although Robainas took the test and passed, he threatened to "seek redress" because he believed that it violated his constitutional rights. T. at 771; RX 5, 6. Hosmer testified that he resented Robainas' threats to sue the company for implementing a policy that was imposed by the Nuclear Regulatory Commission (NRC). *See* T. at 662-63.

In the fall of 1990, after a restructuring of its nuclear engineering department, Florida Power reassigned Robainas to the Outside Services Management (OSM) group under the supervision of Bob Wade. T. at 60, 913. While working together, Wade and Robainas disagreed about various engineering projects affecting the Turkey Point Nuclear Plant (TPN). Some of the projects Robainas worked on included the Westinghouse Setpoint Study, the Pressurized Pressure Transmitter Replacement Project, and the Emergency Response Data Acquisition Display System (ERDADS). T. at 62. In his February 1991 annual performance appraisal, Wade rated Robainas' performance below average overall. RX 11. By letter dated February 23, 1991, Robainas complained to Hosmer about the rating. RX 12. Robainas believed that he was being retaliated against in violation of the ERA, among other reasons. RX 12; T. at 670-72. Hosmer decided to give Robainas a fresh start and to provide more frequent performance reviews. T. at 676. According to Hosmer, Robainas explained that he was under stress, that he was going to night school, that he had been ill, and that his in-laws were moving in. T. at 677. Hosmer viewed Robainas as complaining not only that his bosses were not grading him fairly, but also that he was overwhelmed and stressed out. T. at 678.

Meanwhile, Robainas was transferred to the Production Engineering Group (PEG) under the supervision of Basil Pagnozzi. T. at 76, 201; RX 10. On April 30, Pagnozzi gave Robainas his first interim performance evaluation. T. at 562, RX 18. Again, the overall rating was below average and Robainas was dissatisfied. T. at 253; RX 18. In response, on May 2, 1991, Robainas filed concerns with Florida Power's internal Nuclear Safety Speakout Organization (Speakout). T. at 101; Complainant's Exhibit (CX) 34; Joint Exhibit 1. Speakout personnel did not interview Hosmer, Pagnozzi, or Wade until August 1, 1991.

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In July, for disputed reasons, Hosmer began considering Robainas' psychological fitness for duty. On July 30, Hosmer and Pagnozzi met with Robainas to discuss his performance since April. Pagnozzi read the performance evaluation to Robainas, and Hosmer directed him to undergo a psychological fitness-for-duty evaluation, which already had been scheduled for the next day with Dr. Dennis Johnson. T. at 740-41, 745-46. Robainas objected. At his request, Hosmer postponed the appointment until August 2, but Robainas failed to attend. T. at 744. Hosmer pulled his access badge and rescheduled the appointment for August 19. T. at 746, 752. On August 9, Hosmer learned that

Robainas had contacted the NRC with engineering concerns. T. at 753. On August 19, Robainas refused to go to the psychological fitness-for-duty evaluation and Hosmer fired him. T. at 756. Robainas alleges harassment, false performance evaluations, an illegal fitness-for-duty directive, and unlawful discharge.

DISCUSSION

The ALJ found that Robainas failed to establish a *prima facie* case of any retaliation occurring within thirty days of the date his complaint was filed. R. D. and O. at 39-46. Focusing on Robainas' complaints to Speakout and the NRC, the ALJ found that protected activity could not have motivated the decision to send Robainas for a psychological evaluation because Florida Power was unaware of any protected activity at that time. Also, in his view, the directive to see Dr. Johnson was not an "adverse action" because it was non-punitive. R. D. and O. at 41. Accepting Florida Power's arguments, the ALJ further found the evidence insufficient to establish the causal inference necessary to establish a prima facie case, R. D. and O. at 44-46, and alternatively, that Florida Power articulated and established valid reasons for the July 30 performance rating, the directive to see Dr. Johnson, and the discharge. R. D. and O. at 46-49. In sum, the ALJ concluded that Robainas was discharged solely because he twice refused Hosmer's lawful and reasonable order to see Dr. Johnson. R. D. and O. at 42-43, 45-46.

A. *The Merits*

I accept the ALJ's conclusion that Florida Power articulated valid reasons for Robainas' July 30 performance appraisal, and that Robainas did not prove that those reasons were pretextual. R. D. and O. at 46-48, 44. The record supports the ALJ's findings that Robainas mishandled several projects during the rating period and that his ratings were not inconsistent with ratings from prior years, well before any protected activity. RX 1, 21; T. at 155-56, 268-70, 278-79, 728.

The ALJ's legal analysis of the discharge issue, however, is not supported by the record or the law. First, the finding that

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Florida Power's order to see Dr. Johnson does not constitute an "adverse action" is inappropriate in several respects. Generally speaking, any employment action by an employer that is unfavorable to the employee's "compensation, terms, conditions, or privileges of employment" may be considered an "adverse action" for purposes of the *prima facie* case. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983) (Section 5851 prohibits discrimination in practically any job-related fashion); *see also* 29 C.F.R. § 24.2(b); *Bassett v. Niagara Mohawk Power Corp.*, Case No. 85-ERA-34, Sec. Dec., Sept. 28, 1993, slip op. at 3-4; *McCuistion v. TVA*, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 8 (negative or unsatisfactory performance ratings may constitute adverse actions under the ERA). In finding the order non-punitive, the ALJ focused on the employer's motivation, which is the ultimate issue in dispute.

The federal courts have treated discretionary orders to submit to psychological evaluations as adverse employment decisions in deciding various claims of retaliation. *See Benoit v. City of Claremont*, No. 94-268-JD, 1995 U.S. Dist. LEXIS 16606, at *21-23 (D. N.H. Nov. 3, 1995); *Cooper v. Norfolk and Western Railway Co.*, 870 F. Supp. 1410, 1423 (S.D. W.Va. 1994). The psychological evaluation in this case was not a mandatory pre-employment evaluation, 10 C.F.R. § 73.56(b)(2)(ii) (1995), nor was it otherwise "required" by the NRC as implied by Respondent. Rather, it was ordered pursuant to a policy that allows Florida Power to exercise its discretion and independent judgment in assessing whether to order an employee to submit to an evaluation.[4] Florida Power's company policy states in pertinent part: "Psychological testing . . . may be used to insure the fitness for duty of employees." RX 41 at 4. NRC mandates do not prevent Florida Power from abusing the policy or preclude Robainas from alleging that this order was retaliatory under the ERA.[5] Nor does the fact that Robainas could have appealed the results of the evaluation internally with Florida Power preclude Robainas from asserting his rights under the ERA.

I emphasize that this case is distinct from those cases in which the employee refuses to work. Under the ERA, an employee's refusal to work is protected when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful, and the employee may not continue to refuse to work once the employer corrects the condition or adequately explains why the condition is safe. *See, e.g., Sartain v. Bechtel Consts. Corp.*,

Case No. 87-ERA-37, Sec. Dec., Feb. 22, 1991, slip op. at 8; *Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-2, Sec. Dec., Jan. 13, 1984, slip op. at 6. Here, Robainas did not refuse to work. He did not refuse to perform a particular job function or activity. Robainas refused to follow an order to submit to an evaluation

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outside the scope of his normal work requirements.

When Robainas refused Florida Power's order to submit to a psychological fitness-for-duty evaluation, he did so at his peril. Florida Power fired him for his refusal and would have prevailed in this suit if Robainas failed to prove his claim that the order was retaliatory under the ERA. However, for the reasons discussed below, I find that Robainas met his ultimate burden and proved by a preponderance of the evidence that Florida Power's order that he undergo a psychological evaluation was based solely on retaliatory animus for his protected activity. Therefore, Florida Power violated the ERA in firing Robainas because he refused to submit to the evaluation.[6] *Cf. Saporito v. Florida Power & Light Co.*, Case No. 89-ERA-7/17, Sec. Dec., June 3, 1994, slip op. at 1, 7, Sec. Order on Recon., Feb. 16, 1995, slip op. at 2 (employer violated the ERA when it discharged an employee because that employee refused to reveal safety concerns); *see generally Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 11-12, *appeal filed*, No. 95-1729 (8th Cir. Mar. 27, 1995) (restating and clarifying burdens of proof and production in whistleblower cases); *citing St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) and *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711 (1983).

1. *Florida Power Was Aware of Robainas' Protected Activity When It Ordered the Psychological Evaluation.*

In concluding that Florida Power's order to undergo a psychological evaluation was not motivated by protected activity, the ALJ initially erred by finding that Florida Power was unaware of any protected activity at the time it decided to impose the order on July 26. The record is clear that from February throughout the remainder of Robainas' employment, Robainas was engaging in various protected activities of which Hosmer, Florida Power's decisionmaker, was aware. *See, e.g.*, T. at 666; RX 12.

In the opening statement of his February 23 letter to Hosmer, Robainas charges that Wade's appraisal distorted his true performance and was given in "retribution for [his] commitment to projects that [he] considered critical for the nuclear safety of Turkey Point and which Msrs. Wade/Hale, for budgetary or other reasons, clearly opposed." RX 12; *compare* R. D. and O. at 48. Robainas also referred to specific examples of the basis for his charge. Hosmer and Robainas personally discussed the February 23 letter and the performance rating at length. T. at 674.

Robainas' complaint to management alleging retaliation for protected safety concerns was protected. *See McCuistion*, slip op. at 7-8. In *McCuistion* the Secretary explained that the ERA requires employers to refrain from unlawfully

motivated employment discrimination, and a complaint that an employer has

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violated this requirement is protected because it may invoke the commencement of "a proceeding for the administration or enforcement of [the] requirement" or may constitute participation "in any other action to carry out the purposes of this chapter. . . ." 42 U.S.C. § 5851(a)(1) and (3).

Robainas' perception of retaliation for raising protected concerns was reasonable.[7] During the rating period Robainas and Wade disagreed on issues implicating nuclear safety. For example, Robainas and Wade had a "difference of opinion" on whether to replace certain transmitters that the manufacturer believed were subject to malfunctioning. T. at 68, 916. If operating properly, these transmitters were supposed to sense a drop in pressure that would alert the plant in the event of a loss-of-cooling nuclear accident. T. at 65, *see* T. at 940-41. Robainas concluded that the transmitters had to be replaced, while Wade pressed Florida Power to explore alternatives, including modifying existing equipment or doing nothing. T. at 67, 915. Florida Power ultimately agreed with Robainas and replaced the transmitters. T. at 941-42.

Robainas and Wade also disagreed over whether to fully and promptly complete the setpoint and ERDADS projects. RX 12 at 4; *see* T. at 917, 942, 955. The plant eventually agreed with Robainas with regard to ERDADS. RX 12 at 4. ERDADS was a project initiated to repair the plant system designed to advise the control room operator of existing plant conditions. T. at 64-65. The system was developed following the Three Mile Island accident. The Westinghouse setpoint project involved setting operational limits on plant equipment which cannot be exceeded. When exceeded, the reactor would have to "trip" to prevent or mitigate the consequences of a nuclear accident. T. at 64.

Even if the disagreements between Wade and Robainas involved "technical" issues, as Florida Power alleges, they also plainly involved safety concerns and were protected. Raising safety issues and questioning safety procedures internally constitute protected activity.[8] *See Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec., Dec. 1, 1994, slip op. at 6.

It is clear that Wade was agitated with Robainas because of his firm stance on these projects. *See* RX 11, 12; T. at 669, 673, 176-77. In the performance evaluation Wade cited Robainas' unwillingness to "entertain the opinions of others - particularly his supervision." RX 11. He added:

> Richard is not qualified nor oriented toward project engineering. As such, effective February 1, he will be

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reassigned to the TPN - Production Engineering Group to be more directly involved in I&C design development and problem solving at PTN.

RX 11. Wade explained that Robainas was too involved in the "technical details." T. at 924. Robainas was new to the OSM department which emphasized cost and schedule and expected its engineers simply to oversee a "proven technical performer like a Bechtel or EBASCO." T. at 919, 664-65; *see also* CX 54d. Considering all the evidence, Robainas' belief that his performance rating was retaliatory is understandable. He was not disingenuous. Hosmer testified that Robainas "really had sincere, honest concerns" about whether the rating was fair. T. at 675-76.

Shortly after he was transferred to PEG, Robainas told Pagnozzi that he believed that he was being punished for pushing the setpoint and transmitter projects. T. at 551. He again accused Florida Power of retaliation when he received his April appraisal. RX 18; T. at 100.

By July, Hosmer suspected that Robainas was about to expose his retaliation claim to the press or the NRC. During a high-level meeting early that month, Jerry Goldberg, the President of the nuclear division, stated that he was surprised by a newspaper article about a Florida Power employee who claimed that he was being retaliated against because of whistleblowing. T. at 653, 720-21. Goldberg asked his managers if there were other employees who were in either performance counseling or other situations that might bring in "adverse newspaper or NRC reactions." T. at 721. Hosmer told Goldberg about Robainas. He also stated that Robainas had made threats in the past about going to the newspaper and the NRC. Later, on July 26, Pagnozzi telephoned Hosmer and reported that Robainas was demanding that unless his lawyer was allowed to attend the upcoming interim performance evaluation scheduled for July 30, he would "go to the Miami Herald." T. at 730-31.

Section 5851(a)(1) and (3) of the ERA explicitly protects an employee who is "about to commence or cause to be commenced" or "about to assist or participate in any manner" in a proceeding under the ERA or the Atomic Energy Act. 42 U.S.C. § 5851(a)(1), (3); *Francis v. Bogan*, Case No. 86-ERA-8, Sec. Dec., Apr. 1, 1988, slip op. at 2. Thus, and in line with prior Secretarial decisions, the ERA protects an employee who is about to reveal nuclear safety concerns to either the NRC or the press. *See Floyd v. Arizona Public Serv. Co.*, Case No. 90-ERA-39, Sec. Dec., Sept. 23, 1994, slip op. at 6, and cases cited therein (communicating with media about safety concerns protected);

Francis, slip op. at 2 (employee who is about to go to NRC protected). Robainas' explicit threat on July 26 demonstrates that he was about to take his retaliation complaint to the press, and Hosmer's discussion with Goldberg proves that even weeks

earlier Hosmer believed Robainas was about to go to the press or the NRC.[9]

2. *Robainas' Motives Do Not Remove Protection.*

The ALJ stated that Robainas misused the ERA by raising safety issues only to intimidate management into increasing his performance rating. R. D. and O. at 49-50. The Secretary has held, however, that where the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant. *Oliver v. Hydro-Vac Serv., Inc.*, Case No. 91-SWD-00001, Sec. Dec., Nov. 1, 1995, slip op. at 14; *Carter v. Electrical Dist. No. 2*, Case No. 92-TSC-11, Sec. Dec., Jul. 26, 1995, slip op. at 19; *cf. Berube v. GSA*, 30 M.S.P.R. 581, 596 (1986), *vacated on other grounds*, 820 F.2d 396 (Fed. Cir. 1987) (regardless of a whistleblower's alleged personal motivations, the law's protections extend to employees who reasonably believe in their charges).

3. *Florida Power's Explanation for the Order is a Pretext.*

According to Hosmer, when he told Goldberg about Robainas in early July, he also mentioned that Robainas' performance had declined and that Robainas was under stress. Goldberg suggested that Hosmer consider whether Robainas was fit for duty. T. at 723. Hosmer reviewed the regulations governing fitness-for-duty, and discussed the situation with another manager, but did nothing more until July 26. T. at 724-25. When Robainas demanded that his lawyer be allowed to attend the performance evaluation scheduled for July 30 or else he would "go to the Miami Herald," Hosmer decided "on the spot" to question Robainas' fitness for duty. T. at 731, 734-35. He claims that Robainas' reaction was so "unpredictable" that he feared the consequences of *not* questioning his fitness. T. at 735-36.

Hosmer's explanation is a pretext. Considering the ongoing dispute and Robainas' increasingly adamant concerns that a pattern of retaliation was unraveling, his request for counsel during the next performance evaluation was not "unpredictable" at all. In fact, Robainas referred to "my attorney" in his February 23 letter to Hosmer. RX 12 at 1.

I agree with the ALJ that Hosmer had the duty and responsibility to insure that the people working for him were fit for duty. I also agree with the ALJ that Robainas had told Hosmer and others that he was under stress. His stress, however, was not the reason for Hosmer's decision but was seized upon as an excuse. Although Goldberg mentioned the fitness-for-duty

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regulations in early July, Hosmer did not view his comments as a directive and took no action until July 26 when Robainas threatened to reveal his concerns to the Miami Herald. Hosmer did not mention stress or ill health when Robainas' attorney asked for an explanation for the order on July 30. Instead, Hosmer claimed that he feared sabotage by Robainas. *See* T. at 742-43. There is no evidence that Robainas had been violent or given Florida Power cause to fear destruction or sabotage, and even Florida Power now has retreated from that explanation. *See* Post-Hearing Brief at 132, Reply Brief at 18-19.

Florida Power's expert, Dr. Johnson, testified in general terms that it was reasonable for Florida Power to have referred Robainas for a psychological evaluation given his declining performance, apparent stress, and negative reaction to counseling. T. at 696-97. I question the reliability of Dr. Johnson's opinion since he never saw Robainas or spoke to any of his supervisors substantively about the referral, T. at 698-700, and I am not required to accept it. Interestingly, only partial documentation was provided to Dr. Johnson in connection with the anticipated evaluation and all he could recall was a lengthy letter indicating Robainas' concerns with "discrimination" and one memo of protest to the drug testing. T. at 702. *Cf. Wells v. Kansas Gas & Electric Co.*, Case No. 85-ERA-0022, Sec. Dec., Mar. 21, 1991, slip op. at 15-16 (psychological evaluation invalid when based on background report that Secretary previously found was proof of discrimination).

On the other hand, Pagnozzi testified that as Robainas' first-line supervisor, he observed Robainas virtually daily from February through July. T. at 545. He was trained to identify problems suggesting the need for a psychological fitness-for-duty evaluation. T. at 546. He never questioned Robainas' psychological fitness for duty and would have if he had suspected that Robainas posed any threat to nuclear safety. Pagnozzi was not consulted by Hosmer about Robainas' fitness for duty prior to July 26, when Hosmer unilaterally decided to impose the order. T. at 547, 593-95. Dr. Johnson testified that first-line supervisors may not respond as objectively or dispassionately in these situations as others, T. at 695-96, but Hosmer had observed Robainas personally only twice during 1991. T. at 789. Pagnozzi's testimony, especially when considered with the evidence as a whole, is highly probative.

A number of co-workers, also currently employed by Florida Power, corroborated that they did not observe any psychological instability and never considered Robainas a safety threat. T. at 367-68, 382, 397, 420, 433; Klein Deposition at 10. Nor did John Barrow, the ombudsman who met with Robainas several times at Hosmer's request, ever observe any type of behavior that

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presented a psychological or safety problem that he believed should have been reported to management. T. at 502-503. Hosmer also did not consult with Barrow on the question of Robainas' fitness for duty prior to imposing the order. T. at 501. Hosmer's failure to consult either Pagnozzi or Barrow is additional evidence convincing me of pretext in this case. *See Blake v. Hatfield Elec. Co.*, Case No. 87-ERA-4, Sec. Dec., Jan. 22, 1992, slip op. at 9 n.5 (employer's failure to seek input from immediate supervisor may indicate pretext).

Similarly, Robainas' "declining performance" was not a true reason for the order. Hosmer's explanation for his decision -- that Robainas' request for counsel was so unpredictable -- does not implicate his job performance. Further, Robainas' performance ratings were fairly consistent throughout his employment. His performance became a "problem" only after he voiced his concerns about possible "recrimination" under the ERA. He was promoted just one year before these events.

Hosmer feared retaliation by Robainas, but not sabotage. He

feared exposure of possible wrongdoing, and he imposed the order to submit to a psychological evaluation as a tool or tactic to discourage Robainas from going to the press or the NRC. The record proves that Hosmer consistently objected to Robainas' documenting his protected concerns. In notes taken on March 15, following the discussion with Robainas about his February performance rating and letter, Hosmer wrote, "I again counseled him to find a more constructive avenue for adjudicating performance or policy issues than letter (eg no more ltrs.)." RX 37. Hosmer had counseled Robainas previously, when he complained about the drug testing policy, not to display his concerns or to threaten lawsuits, NRC Speakout, or press involvement in written documents. RX 37. Hosmer admits, in effect, that Florida Power wanted to be the first to tell the news media or the NRC of any problem and disapproved of an employee initiating contact. *See* T. at 721-22. For all these reasons, I am convinced that Hosmer disapproved of Robainas' threats to expose potential retaliation and ordered the psychological evaluation solely as a measure to discourage his protected activity.

The ALJ viewed various actions by Florida Power as evidence that it was not motivated by retaliation, such as: (1) transferring Robainas; (2) changing his performance review schedule; (3) suggesting counseling; (4) giving him a second chance to take the psychological evaluation; and (5) not summarily rejecting the conditions requested by Robainas. R. D. and O. at 50. I disagree. While Florida Power may have appreciated Robainas' intellect and wanted his work performance to improve, most of these acts cited by the ALJ could be viewed

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as a series of actions aimed at monitoring and discouraging protected activity. None proves that Hosmer's stated reason for imposing the order to submit to a psychological evaluation was legitimate and nondiscriminatory. The first three actions were taken by Florida Power well before Robainas' July 26 threat to go to the Miami Herald. The last two actions do not overcome compelling evidence of retaliation by Hosmer in ordering the evaluation.

Even assuming that this is a case of "mixed motives," Florida Power failed to prove that it would have taken the same action against Robainas even if he had not engaged in protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989). Hosmer would not have ordered the evaluation and the insubordination would not have occurred but for Robainas' protected activity.

B. *Timeliness*

The ALJ found that the complaint was untimely filed with respect to Robainas' February and April performance appraisals. I agree that these appraisals were given to Robainas well outside the thirty-day limitations period that applied at the time he filed this complaint on August 29, 1991. 42 U.S.C. § 5851(b). I have considered Robainas' arguments that a continuing violation theory applies, which would render the appraisals subject to a remedial order, but I cannot agree. In rejecting similar arguments previously, the Secretary has recognized that a poor performance rating generally is a discrete act which has the degree of permanence which should trigger an employee's awareness of and duty to assert his rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. *See Nathaniel v. Westinghouse Hanford Co.*, Case No. 91-SWD-2, Sec. Dec., Feb. 1, 1995, slip op. at 23 n.21, citing *Berry v. Supervisors of LSU*, 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986); *McCuistion*, slip op. at 17-18.

I am not persuaded by this record that the appraisals constituted an ongoing discriminatory practice continuing into the charge filing period and expanding the scope of relief. In addition, the decision to place Robainas on an accelerated performance review schedule was made and communicated in March 1991, and I do not find modification of its limitation period appropriate. Even though the early appraisals and accelerated review decision are not actionable, they are evidence "considered to shed light on the true character of the matters occurring within the limitations period." *Simmons v. Arizona Public Serv. Co.*, Case No. 93-ERA-5, Sec. Dec., May 9, 1995, slip op. at 9,

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quoting *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994); citing *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989).

C. *The Remedy*

The ERA provides that upon finding a violation the Secretary shall order the respondent to take affirmative action to abate the violation and reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment. Compensatory damages are also available, and a complainant may recover all costs and expenses reasonably incurred in bringing the complaint. 42 U.S.C. § 5851(b)(2)(B).

ORDER

Accordingly, Florida Power is ORDERED to offer Robainas reinstatement to the same or a comparable position to which he is entitled, with comparable pay and benefits, to pay Robainas the back pay to which he is entitled, with interest, and to pay his costs and expenses in bringing this complaint, including a reasonable attorney's fee. This case is hereby REMANDED to the

ALJ for such further proceedings as may be necessary to establish Robainas' complete remedy.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The amendments to the ERA contained in the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case in which the complaint was filed prior to the effective date of the amendments. For simplicity's sake, I will continue to refer to the provision as codified in 1988.

[2] In August 1994, Florida Energy Consultants, Inc. filed an Amicus Curiae Brief in this case. Both individually and by counsel, in a brief dated August 11, 1994, Robainas objects to various legal arguments made in the amicus brief, and he requests that the brief not be considered. Florida Power also urges that I ignore the brief. In view of the parties' consensus, I have not considered the amicus brief.

Florida Power also moved to strike Robainas' letter to the Secretary dated August 26, 1994, as containing scandalous or impertinent matter. The specific matter challenged, *i.e.*, Robainas' assertion that Florida Power falsified the record, at pages 1-2, is stricken from the letter.

[3] The evidence adduced in this case has been summarized by the ALJ at pages 2-38 of the R. D. and O.

[4] Thus, it is inaccurate for Florida Power to compare this situation to one in which a company disciplines an employee for failing to wear a hardhat or respirator when *every* employee at that workplace is required to wear such equipment.

[5] The NRC's regulations provide that a licensee must provide reasonable assurance that its employees will perform their tasks in a reliable manner and are not mentally or physically impaired from any cause which in any way adversely affects their ability to safely and competently perform their duties. 10 C.F.R. § 26.10(a). The NRC also requires its licensees to address factors which could affect an employee's fitness-for-duty, such as mental stress, fatigue, and illness. 10 C.F.R. § 26.20(a).

[6] While it might have been more prudent for Robainas to comply with the order and then file his claim under the ERA, his assumption of the risk that he would be unable to prove discriminatory motivation in ordering the evaluation does not absolve Florida Power from wrongdoing in imposing the order in violation of the ERA. I note that I am not persuaded otherwise by case law dealing with employees' contractual rights under collective bargaining agreements. *See, e.g., Lewis v. Greyhound Lines-East*, 555 F.2d 1053, 1055 n.4 (D.C. Cir. 1977). The Secretary of Labor represents the public interest in resolving complaints under the ERA, the broad, remedial purpose of which is to protect workers from retaliation based on their concerns for safety and quality. *See Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984).

[7] Protection of an internal complaint is not dependent on proving an actual underlying violation of the ERA. *See Pillow v. Bechtel Const., Inc.*, Case No. 87-ERA-35, Sec. Dec., Jul. 19, 1993, slip op. at 11 n.6, *appeal docketed*, No. 94-5061 (11th Cir. Oct. 13, 1994); citing *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992) (protection under analogous section of the Surface Transportation Assistance Act not dependent on proving actual violation). It is enough that the complainant prove that his internal complaint is based on a reasonably perceived violation. *Cf. Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec., Jan. 25, 1995 (complainant's reasonable belief that his employer is violating Solid Waste Disposal Act is protected).

[8] The fact that other Florida Power workers may have raised similar internal safety concerns during the course of performing their jobs does not render Robainas' concerns unprotected. *See Gibson v. Arizona Public Serv. Co.*, Case No. 90-ERA-29, Sec. Dec., Sept. 18, 1995, slip op. at 4; *cf. Jopson v. Omega Nuclear Diagnostics*, Case No. 93-ERA-0054, Sec. Dec., Aug. 21, 1995, slip op. at 6 (reporting safety violations even in the course of one's regular duties is protected). Nor is protection dependent on the NRC substantiating the charges. *McDonald v. University of Missouri*, Case No. 90-ERA-0059, Sec. Dec., Mar. 21, 1995, slip op. at 11-12.

[9] Robainas' threat is protected even if he also intended to expose matters other than his protected concerns. *See Scerbo v. Consolidated Edison Co.*, Case No. 89-CAA-2, Sec. Dec., Nov. 13, 1992, slip op. at 5 n.4 (ERA violation need not comprise the only or even the predominant subject of the complaint).